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OFFICE OF PETITIONS

In re Application of :
Onishi, et al. :
Application No. 10/054,825 : **ON PETITION**
Filed: January 23, 2003 :
Attorney Docket No. 121027-091 :

This is a decision on the "PETITION TO WITHDRAW HOLDING OF ABANDONMENT UNDER 37 CFR 1.137(a) and 1.181", filed May 3, 2006, which is being treated as a petition to revive the above application under 37 CFR 1.137(a) in view of petitioner's authorization to charge the petition fee to his deposit account.

The petition under 37 CFR 1.137(a) is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled, "Renewed Petition under 37 CFR 1.137(a)." There is no fee for a renewed petition.

The above-identified application became abandoned for failure to timely file a proper response to the final Office action mailed December 13, 2004, which set a shortened statutory period for reply of three months. On March 10, 2005, applicants filed a response. However, by Advisory Action mailed March 29, 2005, the examiner informed applicant that applicant's reply failed to place the application in condition for allowance. Applicants filed an additional response on April 12, 2005, made timely by obtaining a one month extension of time. Once again, by Advisory Action mailed January 30, 2006, the Examiner informed applicants that the response did not place the application in condition for allowance. Accordingly, the application became abandoned on April 14, 2005. A Notice of Abandonment was mailed on March 16, 2006.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(1); (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c).

The instant petition does not satisfy requirement (3).

As to requirement (3), decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable: "The word 'unavoidable' ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business."¹

Moreover, delay resulting from the lack of knowledge or improper application of the patent statutes, rules of practice or the MPEP, however, does not constitute "unavoidable" delay.²

37 CFR 1.135(b), the regulation relevant to the abandonment of this application, provides that (A) the admission of, or refusal to admit, any amendment after final rejection, or any related proceedings, will not operate to save the application from abandonment; and (B) the admission of, or refusal to admit, any amendment not responsive to the last action, or any related proceedings, will not operate to save the application from abandonment. It is the applicant's responsibility to take the necessary action in an application under a final Office action to provide a complete reply under 37 CFR 1.113. "A delay is not 'unavoidable' when the applicant simply permits the maximum extendable statutory period for reply to a final Office action to expire while awaiting a notice of allowance or other action."³

Applicant should have ensured that the amendment had been entered or applicant should have filed either a Request for Continued Examination (RCE) under 37 CFR 1.114, continuing application under 37 CFR 1.53(b), or Notice of Appeal under 37 CFR 1.191. The last day an RCE, continuing application, or Notice of Appeal could have been filed, with the maximum allowed three month extension of time, would have been June 13, 2005. Petitioner has not demonstrated why his failure to file one of these three replies was "unavoidable".

The \$500 petition fee for the filing of the 37 CFR 1.137(a) petition has been charged to Deposit Account No. 12-2136, as authorized.

¹ In re Mattulath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 U.S.P.Q. 666, 167-68 (D.D.C. 1963), aff'd, 143 U.S.P.Q. 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913).

² See Haines, 673 F. Supp. at 317, 5 U.S.P.Q. 2d at 1132; Vincent v. Mossinghoff, 230 U.S.P.Q. 621, 624 (D.D.C. 1985); Smith v. Diamond, 209 U.S.P.Q. 1091 (D.D.C. 1981); Potter v. Dann, 201 U.S.P.Q. 574 (D.D.C. 1978); Ex parte Murray, 1891 Dec. Comm'r Pat. 130, 131 (1891).

³ MPEP 711.03(c) (III) (C) (2).

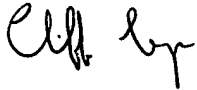
While the showing of record is not sufficient to establish to the satisfaction of the Commissioner that the delay was unavoidable, applicant is not precluded from obtaining relief by filing a request for reconsideration pursuant to 37 CFR 1.137(b) on the basis of **unintentional delay**. A grantable petition under 37 CFR 1.137(b) must be accompanied by: (1) the reply required to the outstanding Office action or notice, unless previously filed; (2) the petition fee set forth in 37 CFR 1.17(m); (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(d). A 37 CFR 1.137(b) petition form is enclosed.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petitions
 Commissioner for Patents
 - P.O. Box 1450
 Alexandria VA 22313-1450

By FAX: (571)273-8300
 Attn: Office of Petitions

Telephone inquiries concerning this decision should be directed to the undersigned at (571)272-3207.



Cliff Congo
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